Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 October 2020*

[Text rectified by order of 26 November 2020]

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 90 – Reduction of the VAT taxable amount – Total or partial non-payment of the price – Conditions imposed by national legislation for the exercise of the right to reduction – Condition that the debtor must not be the subject of insolvency or winding-up proceedings – Condition that the creditor and the debtor must be subject to VAT)

In Case C-335/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 6 December 2018, received at the Court on 24 April 2019, in the proceedings

E. sp. z o.o. sp. k.

v

Minister Finansów,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– E. sp. z o.o. sp. k., by A. Bartosiewicz, conseiller fiscal,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by J. Jokubauskaitė and M. Siekierzyńska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2020,

* Language of the case: Polish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between E. sp. z o.o. sp. k. and the Minister Finansów (Minister for Finance, Poland) concerning tax rulings issued by that minister.

Legal context

EU law

3 Article 63 of Directive 2006/112 provides:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

4 Article 73 of that directive states:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

5 Article 90 of Directive 2006/112 is worded as follows:

'1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

6 Article 184 of that directive provides:

'The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.'

7 Article 185 of Directive 2006/112 is worded as follows:

'1. Adjustment shall, in particular, be made where, after the VAT [value added tax] return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.'

8 Under Article 273 of that directive:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

Polish law

9 Article 89a of the ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004, in the version applicable to the dispute in the main proceedings (Dz. U. of 2011, No 177, item 1054) (‘the Law on VAT’), provides:

‘1. A taxable person may adjust the taxable amount and the VAT due in respect of a supply of goods or services made within the national territory where there are debts which it can show are likely to be irrecoverable. The adjustment also concerns the taxable amount and the amount of VAT relating to the portion of those debts which it claims are likely to be irrecoverable.

1a. A debt shall be regarded as likely to be irrecoverable where it has not been settled or assigned in any form whatsoever within 150 days of the expiry of the period for payment indicated in the contract or on the invoice.

2. Paragraph 1 shall apply where the following conditions are satisfied:

(1) the supply of goods or services is made to a taxable person, as referred to in Article 15(1), who is registered as a taxable person for the purposes of VAT and who is not subject to insolvency or winding-up proceedings;

…

(3) on the day preceding that on which the tax return containing the adjustment referred to in paragraph 1 is filed:
(a) the creditor and the debtor are registered as taxable persons for the purposes of VAT;
(b) the debtor is not subject to insolvency or winding up proceedings;

…

(5) the period elapsed since the date of issue of the invoice establishing the debt, calculated from the end of the year in which it was issued, does not exceed two years;

…

3. The adjustment referred to in paragraph 1 may be made in the tax return for the period during which it has been established that the debt is likely to be irrecoverable, provided that the debt has not been settled or assigned in any form whatsoever on the day on which that tax return was filed by the creditor for that period.

4. Where, following the filing of the tax return recording the adjustment referred to in paragraph 1, the debt is settled or assigned in any form whatsoever, the creditor shall be required to increase the taxable amount and the amount of VAT chargeable in the return for the period during which that debt was settled or assigned. If only part of the debt has been settled, the taxable amount and the amount of VAT chargeable shall increase in proportion to that amount.

…'

10 Article 89b of the Law on VAT states:

'1. Where an invoice drawn up in respect of a supply of goods or services made within the national territory has not been settled within 150 days of the expiry of the time limit for payment specified in the contract or on the invoice, the debtor shall be required to adjust the VAT deduction relating to that invoice in a return for the period of 150 days following the expiry of the period for payment specified in the contract or on the invoice.

1a. Paragraph 1 shall not apply if the debtor has settled the debt at the latest on the last day of the period of 150 days following the expiry of the time limit for payment of that debt.

2. Where the debt has been settled in part within 150 days of the expiry of the time limit for payment specified in the contract or on the invoice, the adjustment shall be made to the input VAT relating to the unpaid part of the debt. The provisions of paragraph 1a shall apply *mutatis mutandis*.

…

4. Where the debt is paid after the adjustment referred to in paragraph 1, the taxable person shall have the right, in the return for the period in which the debt was settled, to increase the amount of input VAT referred to in paragraph 1. If only part of the debt has been settled, the input VAT may be increased up to the amount relating to that part.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 E., a limited liability company incorporated under Polish law with its registered office in Poland and which is VAT registered, provides tax advice, inter alia, to VAT registered businesses which are not connected with it. The services it supplies in Poland are subject to the standard VAT rate.

12 E. sent one of its customers a VAT invoice in respect of tax consultancy services taxable in Polish territory. At the time of the supply of the services, that customer was registered as a taxable person for VAT purposes and was not subject to insolvency or winding-up proceedings. However, that customer was wound up within 150 days of the expiry of the payment period, while remaining registered as a taxable person for VAT purposes. As that invoice was not settled or assigned in any form whatsoever, E. submitted to the Minister for Finance, before the end of the two-year period following the date on which the invoice was issued, a request for a tax ruling in order to ascertain whether, despite the fact that its customer was wound up after the supply of services concerned was carried out, it was entitled, on the ground that the other conditions laid down in Article 89a of the Law on VAT were satisfied, to a reduction in the VAT taxable amount on account of non-payment of the debt arising from that invoice.

13 By a tax ruling of 12 January 2015, the Minister for Finance replied to E.'s request in the negative. The minister stated, inter alia, that Article 90 of Directive 2006/112 confers on taxable persons the right to reduce the VAT taxable amount only under conditions determined by each Member State, which the

Republic of Poland laid down in Article 89a of the Law on VAT. Accordingly, if one of the conditions laid down in that article is not satisfied, the taxable person is not entitled to rely on the right to a reduction by deriving it directly from EU law.

14 The referring court states that E. also requested three other tax rulings regarding compliance with the conditions laid down in Article 89a of the Law on VAT in various factual circumstances in which that article may be applied. It is apparent from the Court's case file that those requests have also not given rise to favourable replies. The referring court states that it joined, on account of the connection between them, the four cases relating to the tax rulings at issue.

15 E. unsuccessfully challenged those tax rulings before the Polish court with jurisdiction at first instance. It subsequently appealed on a point of law before the referring court, on the ground that the court of first instance had wrongly held that the provisions at issue of the Law on VAT did not infringe the requirements resulting from EU law.

16 The referring court has doubts as to the discretion granted to the Member States to determine, in their national law, the conditions for the application of the provisions of Article 90 of Directive 2006/112. In the light, inter alia, of the judgments of 15 May 2014, *Almos Agrárkülkereskedelmi* (C-337/13, EU:C:2014:328), and of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887), it is unsure whether the conditions laid down in Article 89a(2) of the VAT Law are lawful.

17 The referring court states that the Polish legislature adopted, as a measure transposing the second subparagraph of Article 185(2) of Directive 2006/112, Article 89b of the Law on VAT in such a way as to impose on the debtor the obligation to adjust the amount of VAT deductible, as a corollary to the creditor's right to reduce the taxable amount under the conditions laid down in Article 89a of the Law on VAT. Accordingly, the conditions laid down in Article 89a of the Law on VAT, in particular the condition that the creditor and the debtor are subject to VAT, ensure the symmetry of the tax mechanisms for the purposes of the proper collection of tax.

18 The referring court also states that the condition that, under Article 89a(2), of the Law on VAT, the debtor must not be the subject of insolvency or winding-up proceedings ensures the coherence of the Polish legal system by preventing, inter alia, the order in which the claims of creditors are satisfied, laid down by the law of insolvency, from being adversely affected. Thus, in the event that the Court holds that Article 90(2) of Directive 2006/112 precludes conditions such as those laid down in Article 89a(2) of the Law on VAT, the referring court asks whether it must rule by disregarding the applicable national rules on insolvency.

19 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of … Directive 2006/112 …, – and in particular Article 90(2) thereof – having regard to the principles of fiscal neutrality and proportionality, permit the introduction into national law of a restriction on the ability to reduce the taxable amount in the event of partial or total non-payment by reason of the specific tax status of the debtor and the creditor?

(2) In particular, does EU law preclude the introduction of a rule in national legislation which provides for the option of taking advantage of "bad debt relief" only on condition that on the date on which the service or goods are supplied and on the day preceding the date on which the tax return adjustment is filed in order to benefit from this relief:

– the debtor is not subject to insolvency or liquidation proceedings,

– the creditor and debtor are both registered as active VAT taxpayers?'

The questions referred

20 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 90 of Directive 2006/112 precludes national legislation which makes the reduction of the VAT taxable amount subject to the condition that, on the day of the delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return seeking that reduction is filed, the debtor is still registered as a taxable person for the purposes of VAT and is not subject to insolvency or winding up proceedings and that, on the day preceding that on which the adjusted tax return is filed, the creditor is itself still registered as a taxable person for the purposes of VAT.

21 In that regard, it should be noted that Article 90(1) of Directive 2006/112, which relates to cases of cancellation, refusal or total or partial non-payment or where the price is reduced after the supply which gave rise to the payment of VAT takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of Directive 2006/112, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 17 and the case-law cited).

22 In addition, under Article 273 of Directive 2006/112 Member States may impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

23 Given that Article 90(1) and Article 273 of Directive 2006/112 do not, outside the limits laid down therein, specify either the conditions or the obligations which the Member States may impose, those provisions give the Member States a margin of discretion, inter alia, as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities, before reducing the taxable amount (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 32 and the case-law cited).

24 It is, however, apparent from the case-law of the Court that measures to prevent tax evasion or avoidance may not, in principle, derogate from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of Directive 2006/112 and may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 33 and the case-law cited).

25 Consequently, the formalities to be complied with by taxable persons in order to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT, must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received. It is for the national courts to ascertain whether that is true of the formalities required by the Member State concerned (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 34 and the case-law cited).

26 Article 90(2) of Directive 2006/112 allows Member States to derogate from the rule referred to in Article 90(1) of that directive in situations of total or partial non-payment of the transaction price.

27 If the total or partial non-payment of the transaction price occurs without the contract being cancelled or rescinded, the purchaser or customer remains liable for the agreed price and the seller or service provider still has, in principle, its claim, which it can rely on in legal proceedings. Since it is conceivable, however, that such a debt will become definitively irrecoverable, the EU legislature intended to leave it to each Member State to decide whether the situation of non-payment of the purchase price which, of itself, unlike cancellation or refusal of the contract, does not restore the parties to their original situation, leads to an entitlement to have the taxable amount reduced accordingly, under conditions to be determined by the Member State concerned, or whether such a reduction is not to be allowed in that situation (see, to that effect, judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 16 and the case-law cited).

28 As the Court has already held, that power to derogate is based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be provisional (judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 19 and the case-law cited).

29 It follows that the exercise of that power must be justified if the measures taken by the Member States for its implementation are not to undermine the objective of fiscal harmonisation pursued by Directive 2006/112, and it cannot allow the Member States to exclude altogether reduction of the VAT taxable amount in the event of non-payment (judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 20 and the case-law cited).

30 In particular, although it is relevant that the Member States may counteract the uncertainty as to the non-payment of an invoice or the definitive nature of that non-payment, such a power of derogation cannot extend beyond that uncertainty, and in particular cannot extend to whether a reduction of the taxable amount may not be carried out in situations of non-payment (judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 21 and the case-law cited)

31 Moreover, to accept that it is possible for Member States to exclude any reduction of the VAT taxable amount would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his economic activities which are themselves subject to VAT (judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 22 and the case-law cited).

32 In the present case, the conditions laid down in Article 89a(2)(1) and (3)(a) and (b) of the Law on VAT are to be regarded both as the determination by the Republic of Poland, pursuant to Article 90(1) of Directive 2006/112, of the formalities which taxable persons must comply with in order to be able to exercise the right to reduce the VAT taxable amount in situations of total or partial non-payment of the price and, as regards taxable persons who, like E., cannot reduce that taxable amount because they do not fulfil those conditions, as the use by the Republic of Poland of the power to derogate laid down in Article 90(2) of Directive 2006/112. It follows that it is necessary to examine whether the restriction which those conditions entail for taxable persons such as E. is justified by the need to take into account the uncertainty as to whether the non-payment is definitive.

33 As regards, in the first place, the condition which makes the reduction of the VAT taxable amount subject to the condition that the debtor is registered as a taxable person for VAT purposes on the day of delivery of the goods or provision of the services, it must be concluded that such a condition cannot be justified by the need to take account of the uncertainty as to whether the non-payment is definitive. Whether or not the debtor is subject to VAT on the day of delivery of the goods or provision of the services does not, in itself, allow the view to be taken that the debt is at risk of not being recovered. Particularly since, as the European Commission submits in its written observations, goods and services may be supplied to persons who are not subject to VAT, such as entities exempt from VAT or consumers, without that affecting the creditor's obligation to collect VAT on behalf of the State and the right of that creditor to adjust the taxable amount a posteriori.

34 As regards, in the second place, the condition making the reduction of the VAT taxable amount subject to the debtor still being registered as a taxable person for VAT purposes on the day preceding that on which the adjusted tax return is filed, it is important to point out, in addition to the fact referred to in the preceding paragraph of this judgment that the debtor is not necessarily a taxable person, that, in paragraph 28 of the judgment of 8 May 2019, *A-PACK CZ*, (C-127/18, EU:C:2019:377), the Court held that Article 90 of Directive 2006/112 precludes national legislation which provides that a taxable person cannot reduce the taxable amount, in the case of total or partial non-payment, by its debtor, of a sum due in respect of a transaction subject to VAT, if the debtor is no longer a taxable person for the purposes of VAT.

35 As regards, in the third place, the condition which makes the reduction of the VAT taxable amount subject to the creditor still being registered as a taxable person for VAT purposes on the day preceding that on which the adjusted tax return was filed, it must be concluded that that condition is not justified by the need to take into account uncertainty as to whether the non-payment is definitive. Since the existence of the debt and the debtor's obligation to pay it do not depend on whether or not the creditor continues to be a taxable person, the fact that the creditor may or may not be a taxable person for VAT purposes on the day preceding that on which the adjusted tax return is filed does not, in itself, allow the view to be taken that there is a risk that the debt may not be recovered.

36 The considerations set out in paragraphs 32 to 35 of this judgment are not invalidated by the argument set out by the Polish Government in its written observations that, having regard to the link between Article 90 of Directive 2006/112 and Articles 184 and 185 of that directive, namely the interdependence between the VAT payable by the creditor as the seller or service provider and the VAT deductible by the debtor as purchaser or recipient of the service, the requirement relating to the liability to pay VAT of the creditor and the debtor serves to ensure symmetrical reduction of the taxable amount for the purposes of the calculation of the VAT payable, laid down in Article 89a of the Law on VAT, and of the amount of VAT deductible, laid down in Article 89b of the Law on VAT, and therefore, the consistency and sound functioning of the VAT system, while observing the principle of neutrality.

37 Although it is true that the Court has held that, while Article 90 of Directive 2006/112 governs the right of a supplier or provider to reduce the taxable amount where, after the transaction has been concluded, it does not receive the consideration stipulated or receives only a part of it, Article 185 of that directive concerns the adjustment of the deductions initially made by the other party to that transaction, therefore, those two articles represent the two sides of the same economic transaction and they should be interpreted consistently (judgment of 22 February 2018, *T-2*, C-396/16, EU:C:2018:109, paragraph 35).

38 In particular, where a Member State provides, pursuant to Article 90(1) of Directive 2006/112, that, under certain conditions, a taxable person may reduce the taxable amount after the conclusion of a transaction, it must, in order to ensure the principle of fiscal neutrality, apply the second subparagraph of Article 185(2) of Directive 2006/112, so that the other party to that transaction, for its part, adjusts the amount of VAT deductible. That is, in fact, what the Polish legislature did when it adopted Articles 89a and 89b of the Law on VAT.

39 However, the guarantee of a symmetrical reduction of the VAT taxable amount payable and the amount of VAT deductible does not depend on whether the two parties are liable to VAT. Neither the creditor's right to reduce the taxable amount nor the obligation of the debtor to reduce the amount of VAT deductible depends on whether status as a taxable person is maintained.

40 As regards, first, the creditor, it must be held that, where the creditor was a taxable person at the time when the goods were delivered or the services were supplied, the date on which, under Article 63 of Directive 2006/112, the chargeable event occurs and the tax becomes chargeable, the creditor remains liable for the VAT which that creditor collected on behalf of the State, irrespective of the fact that that

creditor has in the meantime lost its status as a taxable person. Furthermore, in view of the fact that, as is apparent from paragraph 21 of this judgment, the taxable amount, as defined in Article 73 of Directive 2006/112, is the consideration actually received, that creditor may, even after having lost the status of taxable person, adjust the taxable amount so that it reflects the consideration actually received and so that the tax authorities do not collect as VAT an amount greater than that received by the creditor. Thus, the creditor's right to reduce the taxable amount for the purposes of adjustment does not depend on the creditor's continued status as a taxable person.

41 As regards, secondly, the debtor, it should be noted that any person who is a taxable person and who is acting as such at the time of the purchase of goods or a supply of services has a right of deduction in respect of that property or service supplied and that, in the absence of fraud or abuse, and subject to any adjustments which may be made in accordance with the conditions laid down by Article 185 of Directive 2006/112, the right of deduction, once it has arisen, is retained (judgments of 2 June 2005, *Waterschap Zeeuws Vlaanderen*, C-378/02, EU:C:2005:335, paragraph 32, and of 22 March 2012, *Klub*, C-153/11, EU:C:2012:163, paragraph 46). Accordingly, it must be possible for the amount of deductible VAT to be adjusted by any person who no longer has the status of a taxable person but who had that status at the time the right of deduction arose. Thus, the debtor's obligation to reduce the amount of deductible VAT does not depend on whether it retains its status as a taxable person.

42 As regards the fact that, once adjustments have been made to the taxable amount and the VAT deductible, there is a risk that the VAT now owed by the debtor may not be paid to the State because the debtor is subject to insolvency or winding up proceedings, suffice it to note, as observed by the Advocate General in points 58 to 60 of her Opinion, that the correlation between the adjustment of the taxable amount and that of the VAT deductible does not necessarily mean that those adjustments must be made at the same time. Thus, that correlation does not prevent the Member States, in view of the absence of a temporal criterion in the second sentence of Article 185(2) of Directive 2006/112, from requiring adjustment of the deductible VAT as soon as the debtor is in default of payment and even before insolvency or winding-up proceedings are opened in respect of the debtor, so as to prevent any risk of financial loss for the State.

43 Moreover, a requirement, such as that at issue in the main proceedings, that creditors and debtors are subject to VAT cannot be justified either by the prevention of irregularities or abuses or by reference to the provisions of Article 273 of Directive 2006/112.

44 It should be noted, first, that the objective of preventing irregularities and abuses does not allow Member States to go against the purpose and scheme of Article 90(2) of Directive 2006/112, as set out in paragraphs 26 to 30 of this judgment, and to justify a derogation from Article 90(1) of that directive on grounds other than those relating to uncertainty as to the non-payment or the definitive nature of that non-payment (see, by analogy, judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 25).

45 Secondly, in the light of the case-law referred to in paragraph 24 of this judgment, concerning Article 273 of Directive 2006/112, it does not appear from the file submitted to the Court that authorising a creditor, such as E., to reduce the taxable amount for VAT purposes despite the subsequent loss of its status as a taxable person or the status of the debtor as a taxable person would pose a particular risk of tax evasion or avoidance. That is all the more so given that, as has been recalled in paragraphs 40 and 41 above, the right to adjust the taxable amount and the obligation to adjust the amount of VAT deductible do not depend on whether both the creditor and the debtor retain their status as taxable persons. In any event, excluding any possibility of a reduction of the taxable amount in such circumstances and forcing such a creditor to pay an amount of VAT which it did not receive in the course of its economic activities goes beyond what is strictly necessary to achieve the objectives referred to in Article 273 of Directive 2006/112 (judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 27).

46 As regards, in the fourth place, the condition making the reduction of the VAT taxable amount subject to the condition that the debtor is not subject to insolvency or winding up proceedings on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return is filed, it should be noted that, by depriving the creditor of its right to a reduction on the ground that it cannot be established that the debt was definitely irrecoverable before the outcome of the insolvency or winding-up proceedings, such a condition effectively takes account of the inherent uncertainty of whether the non-payment is definitive.

47 However, it should be recalled that, in accordance with the principle of proportionality, which is one of the general principles of EU law, the means employed to implement Directive 2006/112 must be appropriate to achieve the objectives stated in that directive and must not go beyond what is necessary in order to attain them (judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 25).

48 It is clear that the uncertainty as to definitive non-payment could also be taken into account by granting the reduction of the VAT taxable amount when the creditor demonstrates, before the outcome of the insolvency or winding up proceedings, a reasonable probability that the debt will not be honoured, even if that taxable base is re-evaluated upwards in the event that payment nonetheless occurs. It would thus be for the national authorities to determine, with due regard to the principle of proportionality and subject to review by the courts, the evidence for a probable extended period of non-payment to be provided by the creditor, according to the specific features of the applicable national law. Such a rule would be an equally effective means of attaining the objective pursued, while being less onerous for the creditor, who pre-finances the VAT by collecting it on behalf of the State (see, by analogy, judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 27).

49 It should also be pointed out in that regard that, first, Article 89a(1a) of the VAT Law specifically lays down a temporal criterion at the end of which the debt is considered to be likely to be irrecoverable and, secondly, that, under Article 89a(4) of that law, the creditor must increase the taxable amount and the amount of VAT payable when, following the reduction in the taxable amount, the debt is eventually settled or assigned. Read together, those provisions in themselves constitute an appropriate measure which, as was pointed out in the preceding paragraph of this judgment, satisfies the requirements of the principle of proportionality.

50 The finding made in paragraph 48 of this judgment applies a fortiori in the context of insolvency or winding-up proceedings, in which the certainty that the debt is definitively irrecoverable can, in principle, be established only after a lengthy period. Such a period is, in any event, such as to inflict on traders subject to that legislation, when they are confronted with non-payment of an invoice, a cash-flow disadvantage compared to their competitors in other Member States, which would clearly undermine the objective of fiscal harmonisation pursued by Directive 2006/112 (see, by analogy, judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 28).

51 [As rectified by order of 26 November 2020] As regards the fact, raised by the referring court, that the condition referred to in paragraph 46 above makes it possible to ensure the coherence of the Polish legal system by preventing, inter alia, the order in which creditors' claims are satisfied in insolvency law being adversely affected, it should be recalled that, first, Article 90(1) of Directive 2006/112 fulfils the conditions for it to have direct effect (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 34) and that, secondly, the principle of the primacy of EU law means that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 61).

52 It follows that, where a taxable person such as E. does not satisfy the conditions laid down by national legislation, which do not comply with Article 90(1) of Directive 2006/112, it may rely on that provision before the national courts against the State in order to obtain a reduction in the taxable amount (see, to that effect, judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 35), it being for the national court before which proceedings have been brought to set aside those conditions which do not comply with Article 90(1) of Directive 2006/112. The fact that, in so doing, other provisions of national law are affected is irrelevant, otherwise the obligation, for national courts to disapply a provision of national law which is contrary to a provision of EU law which has direct effect would be rendered meaningless, thereby undermining the primacy of EU law.

53 In the light of all the foregoing considerations, the answer to the questions referred is that Article 90 of Directive 2006/112 must be interpreted as precluding national legislation which makes the reduction of the VAT taxable amount subject to the condition that, on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return seeking that reduction is filed, the debtor is registered as a taxable person for the purposes of VAT and is not the subject of insolvency or winding-up proceedings, and that, on the day preceding the date of filing of the adjusted tax return, the creditor is itself still registered as a taxable person for the purposes of VAT.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation which makes the reduction of the taxable amount for the purposes value added tax (VAT) subject to the condition that, on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return seeking that reduction is filed, the debtor is registered as a taxable person for the purposes of VAT and is not the subject of insolvency or winding-up proceedings, and that, on the day preceding the date of filing of the adjusted tax return, the creditor is itself still registered as a taxable person for the purposes of VAT.

[Signatures]